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No. 82-195

IN THE
Supreme Court of the United States
October Term, 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., et al.
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# MOTION FOR LEAVE TO FILE and AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF
THE NATIONAL SCHOOL BOARDS ASSOCIATON
TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of Petitioners. Counsel for Petitioners have consented to the appearance. A copy of the letter of consent is attached.

Respectfully submitted,

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MEMORANDUM OF THE NATIONAL SCHOOL
BOARDS ASSOCIATION IN SUPPORT OF
MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

The National School Boards Association has moved this Court for leave to appear as amicus curiae herein for purpose of filing the attached brief in support of petitioners.

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representating school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

There is a concerted National effort on the part of private schools throughout the country, particularly schools with a religious affiliation, to seek passage in other states of laws such as that which is the subject of this case. Thus, the decision in this case will have a major effect on public schools throughout the country. The National School Boards Association, as the representative of the policy-makers for those school districts, the students in those public schools and their parents, have a vital interest in assuring that the separation of Church and State continues and that public support for education of elementary and secondary age children be reserved for public school children.

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# AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

## INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public

schools, and to preserve the decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representating school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

There is a concerted National effort on the part of private schools throughout the country, particularly schools with a religious affiliation, to seek passage in other states of laws such as that which is the subject of this case. Thus, the decision in this case will have a major effect on public schools throughout the country. The National School Boards Association, as the representative of the policy-makers for those school districts, the students in those public schools and their

parents, have a vital interest in assuring that the separation of Church and State continues and that public support for education of elementary and secondary age children be reserved for public school children.

## ISSUES PRESENTED FOR REVIEW

Amicus incorporates by reference the issues set forth in Petition for Certiorari.

## ARGUMENT

### I. CASE LAW HISTORY - PUBLIC AID TO PRIVATE SCHOOLS

The case law on the issue of state aid to education and, more specifically, aid for sectarian elementary and secondary schools, is confusing and inconsistent. The Supreme Court finds itself fashioning narrow distinctions. One finds that parochial students can be loaned textbooks, Board of Education v. Allen, 392

U.S. 236 (1968), but cannot be reimbursed for the loan value of books that they purchase. Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974). Further, students in private sectarian schools can receive textbooks but may not obtain maps and other instructional material to supplement the information found in the textbooks, when such was loaned directly to the schools. Wolman v. Walter, 433 U.S. 229 (1977), Meek v. Pittenger, 421 U.S. 349 (1975).

Reimbursement to parents for the cost of fares for transportation of children attending parochial schools is constitutional, Everson v. Board of Education, 330 U.S. 1 (1947), yet, once at school, the same students may not be provided

with state-funded transportation for field trips. Wolman v. Walter, supra.

> Establishment Clause cases are not easy...[the] decisions have tended to avoid categorical imperatives and absolutist approaches...sacrificing clarity...for flexibility. Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980). (Justice Stevens, in his dissent, contends that this is a understatement and a situation no longer acceptable. Id.).

Prohibition of state aid to religion derives from the First Amendment, which the 14th Amendment makes binding on the states through the Due Process Clause. The language prohibits any law "respecting the establishment of religion." In ruling upon challenges to statutes as violative of the Establishment Clause, the Supreme Court has set three standards as general guidelines. To satisfy the Constitution, a statute "must have a secular legislative purpose, must have as its principal or primary effect neither the advancement nor

inhibition of religion, and must avoid excessive entanglement with religion." See Lemon v. Kurtzman, 493 U.S. 602, 612 (1971). Despite the uncertainty and ambiguity of the case law regarding the specifics of state aid, statutes such as that at issue here would seem unlikely to meet constitutional muster when this three-pronged test is applied.

When broad relief is offered and secular and religious benefits cannot be separated, the Supreme Court has traditionally found that such aid violates the Establishment Clause, regardless of whether the aid is directly or indirectly received by the sectarian school. Thus, in instances where tax relief and tuition reimbursement were offered to parents of children attending non-public elementary and secondary schools, the statutes were struck down by the high court and other federal courts. See Committee for Public Education and Religious

Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 812 (1973); Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).

In Nyquist, a New York State law was challenged that provided for state income tax benefits and tuition reimbursement grants to parents of children attending New York non-public schools. The Supreme Court held that the aid provisions violated the second standard of the Lemon test in that they had the primary effect of advancing religion. The Court found, too, that the third standard was not met, in that "...if the secular use of all funds was to be assured, an intrusive entanglement between the Church and State would be required." Nyquist, 413 U.S. at 780.

The Court found most troubling the fact that tax relief in the form of tuition grants "were

subject to no restrictions that would guarantee separation between secular and religious functions and ensure that State financial aid supports only the former." Nyquist at 783. The state money then would be subsidizing the religious activities of the sectarian schools -- an impermissible advancement of religion. Nyquist at 773. While the Court recognized that some forms of aid may be channeled to the secular without providing direct aid to the sectarian, such a channel "is a narrow one." Nyquist at 777. Further, "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religion." Early v. DiCenso, 403 U.S. 602 (1971). Cases involving similar tax programs were invalidated on the strength of Nyquist. See, for example, Unified Americans for Public Schools v. Franchise Tax Board of the State of California, No. C-73-0090 (N.D. Cal., filed 2/1/74), aff'd mem., 419 U.S. 890 (1974);

Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) aff'd mem. sub. nom. Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools of New Jersey v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978), aff'd, 590 F. 2d 514 (3d Cir. 1979); Sheldon Jackson College v. State, 599 P. 2d 127 (Alaska 1979).

## II. THE MINNESOTA DECISION

Tuition tax deductions or credits at the state level are bad public and educational policy for several reasons:

- o Tuition tax credits and deductions undermine America's traditional system of universal public education.
- o Tuition tax credits and deductions give private schools an unfair competitive advantage over public schools, since private school can refuse to offer services that public schools must provide and because private schools can be more selective with regard to whom they admit.

- o Tuition tax credits and deductions would induce an educational caste system by drawing children from middle and high income families into private schools and leaving the difficult and expensive-to-educate children behind.

- o Tuition tax credits and deductions would erode voter support for local school budgets by attracting to private schools some of the parents most likely to back bond issues and quality programs.

- o The federal and state government's responsibility to the public is to support public schools and leave the private schools alone.

## A. THE LOWER COURT OPINION

### Neutrality: Secular v. Sectarian

The lower court in this case held constitutional Minnesota Statute §290.09, subdivision 22, which authorizes an income tax deduction for tuition, textbook and transportation expenses incurred on behalf of dependents attending elementary or secondary school.

The court based its decision on a notion that parents of both private and public school students are assisted by the statute and, therefore, the statute is neutral to religion and serves a secular, educational purpose. That argument is utter nonsense. Parents of private school students benefit overwhelmingly from tuition, textbook and instructional material deductions of the parents. Of these parents, the vast majority send their children to religiously affiliated schools.

Over five million students are enrolled across the country in private schools, compared with 40,949,100 students who are enrolled in public schools. There are approximately 21,000 private schools in the U.S., that is, 19.6% of all schools. About 10.9% of all students are enrolled in private schools; 84% of those private school students are in schools with a religious affiliation. National Center for

Educational Statistics, U.S. Department of Education.

The primary source of income for private schools is tuition. Public schools do not charge tuition for the regular school year except in very limited instances where a child attends school outside his district. Such transfers outside the district are also not readily allowed by school districts.

The district court below made a finding that one item of deductible expense included "tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school." 676 F.2d 1196. It should be noted that the Education for All Handicapped Children Act, 20 U.S.C. § 1401(18) requires the state to provide every handicapped child "a free appropriate public education." If a school district does

not have an appropriate school for a physically handicapped child and opts to send the child to a private school, that public school district must pay the tuition. Thus, there would be no tuition for the parents to deduct.

Public schools do not even have the option of charging tuition to obtain funding, even were it deemed good public policy for public schools to do so. It is questionable as to whether tuition charges would be upheld, given the fact that public education is a "right" in every state and the requirement of tuition payment may foreclose the exercise of that right by the poor. Plyler v. Doe, 50 U.S.L.W. 4650 (Dec. 15, 1981).

Public school children are provided textbooks free of charge. Private school children buy their textbooks, and thus parents could deduct that cost. Public school children

may purchase some other outside instructional material but those instances are very limited. If a public school student needs material which his parents cannot afford, it will be provided at no cost. Thus, only the private school parents, in the great bulk of the cases, would have deductible costs for instructional materials.

Parents of public school students pay the expenses for many extracurricular activities but, interestingly, this one area where there may be some public school expenses to deduct is the one area which is excluded by the Minnesota statute.

Yet - it is argued that this statute is distinguishable from the statute in Nyquist because "the tax benefits in Nyquist were limited to the class of parents of private school children, as opposed to the broad class

of parents with dependents in both public and nonpublic school." This distinction is untenable in light of the above. It is also fallacious given the class of parents of handicapped and limited-English speaking children who generally have no choice but to attend public schools, and thus, do not fall within the "broad class" of parents benefited by this statute.

Public schools, as we have mentioned, are required by federal law as well as by public policy, to educate all handicapped children in their districts. The average cost for that education is twice that of the average child. 121 Cong. Rec. 23,705. Yet only 2.7% of all religious schools provide programs for the handicapped, charging them tuition in the process. Public schools, on the other hand, charge no tuition and provide all but a scintilla of the cost of educating the most

expensive children. The National Coalition for Public Education Fact Sheet, 1982.

Public schools, by federal law and public policy, are required to provide educational services to students with little or no English language proficiency. Lau v. Nichols, 414 U.S. 563 (1974). Bilingual and total emmersion programs for these children are very expensive. Although statistics are unavailable, it is unlikely that many private schools are able to serve these children. The parents of these limited-English speaking children, even with a tax incentive, still do not have a choice of where to educate their children. Yet the court below finds that the statute aids parents of both public and private students.

The lower court decision dwelt at some length on the second and third part of the 3-prong Lemon test, supra, in determining

whether the state is violating the First Amendment. However, the first prong is equally important and in this case may be even more important. That test is whether there is a "secular legislative purpose" for the statute. Although the Minnesota legislature engaged in various ploys to disguise its true intent, in order to assure that the statute passes Constitutional muster, there is little question that the sole motivation behind the law was to assist religious education.

The driving force for the Minnesota statute, as well as similar legislative proposals at both federal and state levels, has been the Catholic schools. Breneman, "Tuition Tax Credits: Where Would They Take Us? Should We Agree to Go?", Brookings Institution, 1981. Although framed in terms of "providing educational alternatives", it can be assumed that the real reason for the push for tax incentives for private schools is

to provide the alternative of religious education, not just education at the private level.

The rational for such tax incentive proposals is very clearly stated in a recent editorial in Momentum, Journal of the Catholic Education Association. See Appendix. "The ensuing complacency and the gradual exile of God from the public schools by secular humanist educators and the Courts led to an increased realization by many parents of the need for alternate schools and especially religious schools which would give God his rightful place." Certainly the motive of the advocates of tax relief for private school parents is to promote religion and religious education. Private schools and religion cannot be separated.

The statute also fails the third standard of the Lemon test, that of entanglement.

The Minnesota legislature attempted to separate religious from secular equipment, books, supplies, etc. That separation is simply not possible. Religious schools, as noted in the quoted editorial, do not set up their curriculum so that children are provided secular education in one class and religious education in another class. Religion is interwined throughout all of the classes. As noted in the editorial, the religious educator views the entire curriculum as a means of inculcating religious values in the students.

It is not as difficult to separate secular and sectarian expenses for activities outside the school and classroom, eg. transporation. Nevertheless, there is no way that the state can know whether a class in history, in which students use textbooks and other materials for which the parents receive a tax deduction, portrays history in a secular fashion or whether

it weaves in religious themes as well. In classes such as health, where parents receive a deduction for textbooks and other materials, Catholic schools may also discuss religious attitudes toward abortion. The only way the state can assure itself that the materials, for which deductions are received, are used only in a secular fashion is to send a representative to the classroom to attend a class. Merely auditing the taxpayer will not provide the information necessary to assure that the deductible items are being used solely for secular purposes. If state monitoring of religious schools is not "entanglement" with religion, then the word "entanglement" simply has no meaning.

Tax Deduction v. Tax Credit

The lower court attempts to distinguish between the statute in Nyquist and the Minnesota statute by distinguishing between a tax

deduction and a tax credit. "Whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayers from a high tax bracket to a lower one. Thus, in this sense, the indirect tax benefit to the school is more diffused and less certain" than the benefit of a tax credit. 676 F.2d at 1204.

That reasoning is specious. Overall, the dollar amount of lost income to the state which is represented by the deductible amounts of private school tuition is considerable. The fact that the total amount of net tax savings may vary from individual to individual is not relevant. In fact, the net tax savings for some individuals may well be more than the amount of the New York tax credit found to be unconstitutional in Nyquist.

From the standpoint of the "purpose" (1st standard in Lemon) and the "effect" (2nd

standard in Lemon) of the statute - there is no difference between a credit and a deduction. The only difference is that in the former instance the exact amount of aid is known in advance, whereas in the latter the amount will not be known until the taxpayer's bracket is determined. In both cases the "purpose" is exactly the same - to aid religious schools. The "effect" may or may not be different depending on the dollar amount of the credit and the dollar amount of the deduction. If the deduction is large enough, its "effect" may even be greater than the credit. However, one thing is clear, since the effect of the deduction on public schools is di minimus, its "primary effect...advances...religion."

Analogy to Federal Charitable Deduction

The lower court discusses the federal tax exemption statutes for religious entitites. However, "dispensation granted under the free-

exercise clause is quite distinct from disbursements challenged under the non-establishment clause..." Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1980, 1982 (1969).

The lower court erroneously compares the federal charitable deduction and the Minnesota statute and uses the analogy as an argument in favor of tax deductions for religious school expenses. First, there is no Supreme Court decision holding such deductions to be constitutional. But, assuming arguendo that such deductions pass constitutional muster, the analogue to tuition tax deductions is not appropriate.

Let us assume for purposes of argument, that the secular/sectarian breakdown of corporations, qualified under 26 U.S.C. §501(c)(3) to receive tax deductible contributions, is similar to the

break down between secular and sectarian elementary and secondary schools. Clearly, there is very little difference between the effect of the deduction on secular and on sectarian organizations, each being private and each receiving funding through private sources. Thus, a statute such as 26 U.S.C §501(c)(3) is not only neutral on its face, but also the primary effect of the statute does not favor sectarian over secular.

In the statute here, that is not the case. Although the statute may appear neutral on its face, there is a gross disparity between its effect on public and on private schools. Providing a deduction for public school tuition is like providing a choir robe and Bible deduction for all charitiable organizations. The American Red Cross uses choir robes and Bibles about as often as public schools charge tuition.

## B. ARGUMENTS OF PROPONENTS

### Aid to Parents, Not Schools

Proponents of tuition deductions and credits argue that the Minnesota statute and similar proposals are merely means of assisting parents - not schools - to seek an alternative method of educating their children. They argue that the purpose is to expand the choice of parents, to achieve diversity.

The dichotomy between pupil (or parent of pupil) benefit and benefit to the schools seems to be "a chimerical constitutional criterion. It is akin to the ineffectual effort in the mid-nineteenth century to classify such local measures as pilotage laws as either regulations of safety or regulations of commerce, and to make their validity turn on the classification. It was the beginning of wisdom when the Court candidly recognized that such measures were of both safety and commerce, and that before a

sensible judgment could be made, a closer look had to be taken at their consequences for both, as well as their exigency, in light of the policies underlying the commerce clause." Freund, supra.

Over the years lobbyists for private religious schools have succeeded in getting the Congress to include provisions for private schools in several pieces of federal education legislation such as: Educational Consolidation and Improvement Act, P.L. 97-35 (1981) (which "blocks" grants formerly included in the Elementary and Secondary Education Act, Impact Aid and others); National School Lunch Act, 42 U.S.C. §1751; Education for All Handicapped Children Act, P.L. 94-142 infra.

The validity of these provisions is defended on the ground that they exemplify aid to children, rather than aid to private schools.

It is submitted that this form of aid, too, is unconstitutional. However, we would argue that the provisions are different from that challenged here in that these federal programs provide additional services to the child which the child would not otherwise receive as a result of attendance at the private school - although it is still submitted that the incentive provided by these statutes to parents to induce them to enroll their children in private schools renders them unconstitutional.

In Minnesota, however, the state is not merely providing supplementary services, but is actually paying for the private school education itself, and the religious instruction which is an integral part of most private schools. See Freund, supra.

**Choice**

It is also argued that the tuition deduction provides an opportunity for private schools to compete with public schools, thus furthering parental "choice". However, there can never be "fair competition" between public and private schools.

Public schools, by their very nature, are organized to serve all school age children. The U.S. Constitution and various federal statutes (as well as good public policy) require public schools to serve society's most expensive children - eg. the handicapped, 20 U.S.C. §1401 et seq.; the sociologically and economically disadvantaged; the limited-English speaking, Lau v. Nichols, 414 U.S. 563 (1974). Private schools may serve some of these children but there is no requirement that they do so, and in fact, if these children had to depend on private schools for their education - they would not be

educated. Recently, for example, the Fairfax County, Virginia Human Relations Commission amended its rules so as to cease requiring private schools to serve handicapped children. Fairfax Journal, November, 1982. The private schools noted that they do not discriminate against handicapped children - they just do not have the facilities and services to meet their needs. Thus, parents of handicapped children in Fairfax, Virginia do not have a choice, regardless of whether Virginia offers a tax deduction or credit for tuition for private schools.

Statutes in every state in the land require the attendance of every school age child at a public school or at a private school which meets minimum state standards. Thus, no child can be denied a free education on any ground, whether economic or educational. Public education is a right. Private schools, on the other hand, may

decide who to serve and may charge students for attendance. Private education is a privilege, not a right.

Analogy to Federal Energy Credit

Proponents of tuition tax credits and deductions argue that these measures are no different than the federal measures such as the federal energy credit. They are right. The federal energy credit is an incentive, a reward, to get people to act in a certain way - ie. to buy and install storm windows and other energy services in order to conserve energy.

By the same token, the Minnesota legislature is using the tax incentive system to induce parents to send their children to private schools and thus to support the private religious system of education. The tax deduction certainly is no inducement to public school parents, because it offers deductions for

expenses which public schools do not charge.

Private Schools Serve a Public Purpose

The proponents also argue that private schools serve a public purpose by taking over the burden of the education of children who would otherwise be enrolled in public schools. This is inaccurate. First, as noted earlier, the most expensive-to-educate children are not enrolled in private schools. Second, "the education services of church schools are not rendered at the instance of the state, nor is a saving to the state the purpose or objective of such instruction. Religious instruction is calculated to strengthen religious faith and convictions, and the state may not constitutionally support such a project, even if indidental savings to the state can be shown." Gordon, "The Unconstitutionality of Public Aid to Parochial Schools", The Wall Between Church and State 73 (Oaks ed. 1963).

## III. IMPACT OF THIS DECISION AT FEDERAL LEVEL AND IN OTHER STATES

The private religious school lobby's primary initiative has been at the federal level where the current Administration, following the lead of proponents of tax incentive initiatives in prior years, is now proposing major changes in the way that the federal government treats public education. The tuition tax credit for parents of private school students is the cornerstone of the Administration's proposal for federal involvement in education.

Under S. 2673, 97th Cong., 2d Sess., Cong. Rec. S. 7405 (June 23, 1982), which is a diluted version of the Administration's proposal, it is estimated that the tuition tax credit would average $89 per private school child in the first year, $215 in the second year and $321 in the third. On the other hand, spending by the federal government for public school education

will fall from $207 per child in 1980-1981 to $105 in 1984-85. The Effect of Tuition Tax Credits on Urban Schools, A Joint Report by the Council of the Great City Schools and American Association of School Administrators, August 1982.

Although the private schools have but one-fifth the need of public schools, the federal government is proposing that it now fund private school instruction at three times the rate of publics.

The Administration has not been as clever, however, as the Minnesota Legislature which attempted to disguise its sectarian motive so as to get around the Constitutional objections. Nevertheless, in both purpose and effect, there is no difference between the current Administration's tuition tax credit proposal and the Minnesota deduction at issue here. Both

have the intent to subsidize private religious education, even to the detriment of public schools. Both achieve that objective.

Twenty states and the District of Columbia (including Minnesota) have more that ten percent of the total elementary and secondary enrollment in non-public schools. National Center for Educational Statistics. Thus, should the Minnesota statute be upheld the private school lobby will assuredly begin lobbying these states to pass similar legislation. Rhode Island, as noted by the Court below, has already passed legislation which has been held unconstitutional by the First Circuit. Rhode Island Federation of Teachers v. Norberg, supra.

## CONCLUSION

The Minnesota statute is an example of public policy-making at its worst. The right to a free public education is one of the things

which has made this country great. Statutes such as that at issue here have the potential of destroying support for that institution.

It is also important, of course, to preserve and protect the diversity of opportunities in education and in other areas of society. But not at the expense of the great American tradition of the public school which is offered to all free of charge: rich and poor, black and white, English-speaking and non English-speaking, handicapped and able-bodied.

The Minnesota legislature, in answer to a concerted and powerful private school lobby, has adopted a measure to advance the cause of religious education. It has attempted to disguise this unconstitutional intent in a cloak of "neutrality", but that cloak is gossamer and through it can be seen the true intent of the state. We hope this Court will see through this deception.

The Concept of Separation of Church and State is deep-rooted in our Constitution. This case exemplifies exactly the type of conflict that our Forefathers sought to avoid. Respondents note that the connections between Church and State are justified because the private schools take some of the educational burden off the State, because parents should have a choice of attending church schools and other reasons which may make some sense today. But what about tomorrow? Can any of these reasons justify the erosion, however slightly, of the Constitutional principles at risk here? At all costs, the absolute separation of Church and State must be assured so that over the years, we will be certain to avoid the devastating consequences seen in places such as Iran. The church must seek private sources of

support for their schools, just as the State must keep religion out of public schools.

> While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall. It was healthy when President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church-state relations by pointing to binding Supreme Court decisions. Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decision possess, I would choose the latter in the field of God and Caesar and the public treasury. This basic preference may help to account for what otherwise may seem a too rigid, and not sufficiently permissive, view of constitutional commands. Freund, supra at 1692.

Respectfully submitted,

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APPENDIX

## TUITION TAX CREDITS: The American Way

from Momentum - Journal of the
National Catholic Education
Association, Oct. 1982, at 12.

The American tradition demands tuition tax credits. The hallmark of the United States and, many feel, its greatness has been the free enterprise system. Immigrants flocked to this country because they saw it as a land of opportunity for the willing. If one worked hard and well, one succeeded. If one were lazy or complacent, one fell behind.

This belief was reflected in education. Our schools were intended to help children be God-fearing, productive members of the American society. The schools existed in many forms -- Protestant, Catholic, Jewish, private and public. All performed a public function and, in this country's early years, were supported by public funds. Most would agree that this diversity has been a significant source of our strength as a society. Beginning in the 19th century, public support was restricted to public schools; a decision heavily influenced by the prevailing anti-Catholicism of the times. Many non-Catholic religious schools disappeared. Catholic bishops urged their flocks to increased sacrifices to continue parochial schools.

In short order public schools began to assume an educational monopoly. Like all monopolies, they became complacent and content with the status quo. As competition lessened,

so did quality. Excellence demands competition. In business in sports and in education, competition encourages creativity and the maximum use of energies and abilities.

The advent of Sputnik sent a shock throughout the system and caused an immediate renewal. As time progressed, this subsided. The ensuing complacency and the gradual exile of God from the public schools by secular humanist educators and the Courts led to an increased realization by many parents of the need for alternative schools and especially religious schools which would give God his rightful place. As a result, the past decade has seen an increased in the number of Protestant schools and Jewish day schools.

Through this century Catholic schools were able to continue their good work with the help of dedicated religious (sic). When, after Vatican II, these men and women began to choose other apostolates, their places were taken by equally dedicated laity -- but laity who, of necessity, needed higher salaries. Tuitions were instituted, then increased to compensate for these higher salaries and for the galloping inflation.

Now, we are faced with the need to help parents who desire a religious education for their children. Thes best method available at the moment is tuition tax credits. This system flows from established government tax policies of promoting and rewarding citizen initiatives which likewise help the country (deductions for charitable gifts and credits for energy-saving improvements).

The alternative to this assistance is a monopolistic public school system. The fact that such a system would no doubt fall into complacency is dangerous to America. The fact that of necessity it would be secularist disturbs many thoughtful Americans. Parents need to have a free choice when it comes to a product (their children's educaton) that they are forced to accept. To deny them help in making that choice, in reality to deny them a choice, is un-American.

Tax credits may not be a perferct answer and may have some faults, but it embodies one of the nation's more treasured rights -- the fundamental right of parents in choosing the form of education for their children. As such, the tax credit initiative should be supported as truly expressive of the American way.

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